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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 71

THE UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK LAUDANI.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF

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Opinions Below

The majority (R. 241-248) and dissenting (R. 248-249) opinions in the Circuit Court of Appeals are reported in 134 F. (2d) 847. The memorandum opinion of the District Court overruling Respondent's demurrer and motion to quash the indictment appears at R. 25-29.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 16, 1943 (R. 250), and a petition for re-

hearing was denied April 20, 1943 (R. 251-252). The petition for a writ of certiorari was filed May 24, 1943, and granted October 11, 1943 (R. 252). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statute Involved

The Act of June 13, 1934 (c. 482, 48 Stat. 948, 40 U. S. C. 276b), commonly called the "Kick-Back" Act, provides:

1. That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit wit' respect to the wages paid each employee during the preceding week.

Question Presented

It is conceded by the Government that the judgment of the Circuit Court of Appeals in reversing the District Court should be affirmed (Government's Brief, p. 8; footnote 5, p. 13; footnote 9, p. 44). This Court must therefore determine whether the remand to the District Court should be

for the purpose of quashing the indictments or for a new trial. This involves the consideration of whether the prohibition of the "Kick-Back" Act applies to Laudani, who was charged with acting solely in his own interest and not in behalf of the contractor or subcontractor. He was not a party to the contract of employment of his alleged victims. No kick-back to or enrichment of the employer resulted.

Statement

Respondent and one Rossi, together with several others, were charged in a series of indictments with violations of the "Kick-Back" Act of June 13, 1934 (R. 14-18, 241-242). Except for differences in names of the defendants and in allegations as to the names of victims, dates of the violations, and sums of money exacted, the counts of the indictments were couched in identical language (R. 14, 25-26). They alleged that between January 1, 1937, and May 15, 1938, there was under construction at Weehawken, New Jersey, a certain public work known as the Weehawken Plaza connection of the Lincoln Tunnel under the Hudson River from New York to New Jersey; that the work was being done under a contract between the Port of New York Authority and George M. Brewster & Son, Inc., the general contractor, and a subcontract between the Brewster Company and the Cape Ann Granite Company, Inc., for the furnishing and setting of granite rubble facing and coping necessary in the construction of the Weehawken Plaza connection; that all of this public work was being financed in part by grants from the United States; that Respondent was foreman for the Cape Ann Granite Company, with authority to employ and discharge stonecutters and masons, and knew that the rate of pay for such employees, as fixed and posted on the work, was a certain amount per hour, and that these employees were entitled to receive the full posted rate of pay without deductions for any purpose;

and that Respondent and his co-defendants, by intimidation and threats of dismissal and by giving to understand that all persons employed on the work would be required to give the defendants part of their true wages so long as they were so employed, induced certain named employees to surrender to them parts of the compensation to which the employees were entitled for work and labor on the public work (R. 14-15, 26).

The defendants filed a demurrer (R. 19-22) and motion to quash (R. 22-25) the indictments on the ground, inter alia, that it was not alleged that they were the employers of the victims, or that they were acting on behalf of the employer in inducing the victims to give up part of the compensation to which they were entitled (R. 19, 20, 23). The demurrer and motion to quash were overruled by the Judge hearing them, in a written opinion (R. 25-29). This objection was renewed at the opening of the trial (R. 32, 33), at the close of the Government's case (R. 135), and at the conclusion of all the evidence (R. 179), and in a motion in arrest of judgment (R. 210), and was in each instance overruled.

The Government elected to proceed on five of the indictments and, after a severance as to the defendants other than Respondent and Rossi, these indictments were consolidated for trial (R. 14, 33). At the close of the trial the Government consented to the dismissal as to Respondent of all three counts of indictment numbered 10C, and seventeen of the counts of the remaining four indictments (R. 181, 182, 208).

Nine counts were submitted to the jury, and Respondent was convicted on each of these (R. 208). The defendant Rossi was acquitted on the counts submitted as to him (R. 208). Respondent was sentenced to nine months' imprisonment on each count, the sentences to run concurrently (R. 211).

The evidence in support of the allegations of the counts on which Respondent was convicted may be summarized as follows:

In 1926 the Port of New York Authority undertook to construct, as part of the Lincoln Tunnel project, certain installations at the New Jersey approach, and the United States, through the Public Works Administration, granted $4,780,000 to the Authority to aid in financing these works (Ex. G-5, R. 39). Most of the cost of the enterprise was financed by the Authority. Contracts for portions of the works were let by the Authority to George M. Brewster & Son, Inc. (Ex. G-6, R. 40; Ex. G-7, R. 40), and the latter, in turn, sublet to the Cape Ann Granite Company, Inc., contractors for furnishing and setting granite rubble facing and coping at the Weehawken, New Jersey, approach to the tunnel (Exs. G-8, G-9; R. 41, 42). It is doubtful that any of the funds of the Public Works Administration were actually disbursed to the Cape Ann Granite Company, Inc. (R. 53, 54).

Laudani is married and has a family. He was well regarded in the community where he lived (R. 138). He was not an officer director or stockholder of the Cape Ann Granite Company (R. 153). He was employed as a foreman at $60 a week (R. 154) and was given authority to hire and discharge employees for and in behalf of that company (R. 48). However, the officers of the Cape Ann Granite Company, together with its estimator, were usually at the site of the work, representing the company (R. 156). The work commenced early in 1937 and ended May, 1938. The Cape Ann Granite Company were obliged to obtain union stone masons through three labor union locals (R. 154). Each local had a business agent at the job to see to it that there was no infraction of union rules (R. 155). One of them was Louis Mazzola, who was business agent of the local to which Laudani belonged (R. 155). Although the Cape Ann Granite Company employed 100 workmen, there was no complaint by anyone until nine months after the work had been completed (R. 147, 160). During those nine months Laudani had engaged in three heated election contests with Mazzola for offices in the local (R. 160-164). The

contests created bitterness between Mazzola, his followers and Laudani (R. 160, 161), and Mazzola swore revenge (R. 162).

The Government's investigation commenced shortly after the last contest (R. 119-135). It was instigated and directed by Mazzola (R. 147). The Government's witnesses were adherents of Mazzola (R. 161-164). Only a few of the 100 workmen employed by the Cape Ann Granite Company made charges. Only one of them (Tomasello) said Laudani asked him to rebate 25 cents an hour (R. 88). The others said they conversed with Rossi or a fellow-workman (not in the presence of Laudani), and thereafter paid to Rossi or the fellow-workman from 25 to 35 cents of their wages for each hour of their employment (R. 56, 81, 93, 99, 107). In a few instances they left the money at the foreman's shanty with Laudani (R. 60, 62, 63, 82, 94). Laudani vigorously denied the charges (R. 159). He claimed the small sums which the workmen paid him were repayments of loans which he had made (R. 158, 168). Rossi also denied the charges and corroborated him (R. 139-153). There was no evidence of the use of force or threats. The Government established that the Cape Ann Granite Company and its officers knew nothing of these alleged activities and did not authorize them (R. 49).

ARGUMENT

The Construction of the "Kick-Back" Act By the Majority Below Is Supported By the Language of the Statute, the Legislative Intent and History

The Language of the Statute

The language of the "Kick-Back" Act unequivocally delineates the situation it seeks to remedy and punish. It is the inducement of an employee of a certain type "to give up any part of the compensation to which he is entitled under his contract of employment". The Government con-

cedes (Government's Brief, pp. 2, 33) that the "contract of employment" is the contract between the employer and the employee, and, of course, no other contract is or could be contemplated. This is the holding of *United States* v. *Golder et al.*, 11 F. Supp. 870, 871 (D. C., E. D. Pa.), as well as the majority and dissenting opinions of the Court below. It follows, therefore, that in the construction of this Act we must ascertain and describe the *conduct* that *could* invade or disturb this contract. In other words, we must circumscribe the statute so that the conduct denounced and the persons capable of violations are in clear relationship to the impairment, violation or derogation of the employee's contractual right to obtain the wages he is entitled to receive.

Only the employer is the other party to the "contract of employment" and only the employer provides the "compensation to which he is entitled under his contract of employment". Only the employer, therefore, or one acting for or on his behalf, is so situated, legally or otherwise, that he can come within the field of operations described or anticipated by the "Kick-Back" Act. The majority below (R. 243) aptly held:

> "From a reading of the statute it seems plain that the evil aimed at is the inducing of an employee, 'engaged in work of the character specified, 'to give up any part of the compensation to which he is entitled under his contract of employment.' The 'contract of employment' referred to of course means the contract between the employee and his employer. 'United States v. Golder et al., 11 F. Supp. 870; 871 (D. C., E. D. Pa.). Essential, therefore, to the crime as defined by the statute is the impairment, violation or derogation of the employee's contractual right with respect to the wages he is to receive. 'As the person capable of so offending, because of the requisite privity of contract, is the employer, the statute as written necessarily has application to a situation where the employee gives up or cedes a portion of his contractual wage to or in favor of or at the instance of the employer or one acting for or on behalf of the employer."

This construction finds support also in the use of the phrase "give up". Relating, as it does, to "compensation" and to the "contract of employment", these words "give up" must refer to the wages earned under the contract and must refer, further, to a giving up to the other party to the contract, namely, the employer. This is what is legally and factually contemplated in a "kick-back". Accordingly, it has been held that "give up" in this statute means "pay back", "return". *United States* v. *Charlick*, 26 F. Supp. 203 (D. C., E. D. Pa.). In this case, Judge Kirkpatrick stated, on page 205:

> "The offense at which it is aimed is; compelling workmen to return to their employers wages to which the contract between the employer and his employees entitles them."

In *United States* v. *Golder et al.*, 11 F. Supp. 870 (D. C., E. D. Pa.), the same Judge stated:

> "If the workman receives the whole amount of wages which the employer agreed to pay him when he went to work, and is not compelled to give back or to waive any part of it, the act has not been violated."

The same conclusion was reached by the Comptroller General in a decision (A. 90983) rendered to the Secretary of the Treasury on December 14, 1939 (19 Comp. Gen. 576; 577, 578). The statute therefore contemplates that the earnings have actually passed into the possession of the workman and before there can be any violation it must appear that the workman has paid back or kicked back some portion of his earnings to the employer or to one acting for or on behalf of the employer. According to the title, the statute sought "to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes". If the workman receives from his employer the full amount of the compensation contracted for, without any requir-

ment to give back any part of such compensation, how can it be said that he has been induced to give up that to which he is entitled under his contract of employment? The majority opinion below, in recognizing this, states:

> "So long, therefore, as the employer pays his employees the wages to which they are entitled under their contracts of employment and the employees are not induced or required to give back any part of their compensation, it cannot be said that they have been prevented from receiving the compensation to which their contracts of employment entitle them. What happens to the compensation after the employee has received it in full, and wholly without relation to or effect upon his contract of employment, is a matter with which this statute does not purport to deal."

Certainly no doubt that this is the proper construction of the statute can remain after examining Section 2 of this statute. Congress provided that "to aid in the enforcement of the above section", reasonable regulation should be made for "contractors or subcontractors", and that each "contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week". It is noteworthy that Section 2 of this statute, which is to assist in the enforcement of Section 1, is coextensive and consistent with the construction of Section 1 set forth herein. Section 2 would fall far short of aiding the enforcement of the statute as interpreted by the Government.

In construing this statute in accordance with the language and phraseology used it is important to bear in mind that this is a penal act which must be strictly construed in favor of the accused. Statutes which are penal in nature should not be interpreted to include situations or acts outside of the clear and explicit language of the statute.

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37, 42; Fasulo

v. United States, 272 U. S. 620, 628, 71 L. Ed. 443, 445, 47 S. Ct. 200. * * * Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. United States v. Lacher, 134 U. S. 624, 628, 33 L. Ed. 1080, 1083, 10 S. Ct. 625; United States v. Chase, 135 U. S. 255, 261, 34 L. Ed. 117, 119, 10 S. Ct. 756; Fasulo v. United States, supra (272 U. S. 629, 71 L. Ed. 445, 47 S. Ct. 200)." *United States* v. *Resnick*, 299 U. S. 208-210.

"Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain." *United States* v. *Noveck*, 271 U. S. 202, 204.

"'Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid,' (United States v. Brewer, 139 U. S. 278, 288) and that ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation *in favor of the liberty of the citizen.*" *Ex Parte Charley Webb*, 225 U. S. 663, 689. (Emphasis supplied.)

The Government in its brief (pp. 14, 15, 20, 21, 22, 23, 24, 25, 26) seeks to make much of the use of the word "whoever" and cites various statutes wherein that word or similar words have been construed generally. No doubt there are various statutes in which Congress intended "whoever" to be without limitation, and the courts have determined such intention by interpreting the legislative history of the statute and by construing the context of the language. However, it is equally true that many statutes using the word "whoever" or words of similar import have been construed to be limited in their application by the same process of interpretation and construction.

In *United States* v. *Katz*, 271 U. S. 354, 362, this Court said:

"General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead

to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation.".

In that case, the defendant was indicted for a conspiracy to violate a law of the United States which provided, "No person shall * * * sell any liquor without making at the time, a permanent record thereof * * *". This Court held that the statute did not apply to one who unlawfully sold liquor and kept no record.

In the case of *Church of the Holy Trinity* v. *United States*, 143 U. S. 458, the church made a contract with a minister (an alien residing in England) to come to the City of New York and enter into its service as a rector and pastor. In pursuance of such contract, the minister removed to the United States and entered upon such service. The act which the church was charged with violating was as follows:

> "* * * it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien into the United States, under contract or agreement made previous to the importation of such alien * * * to perform labor or service of any kind in the United States."

This Court quoted (p. 460):

> "* * * The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.'"

In the recent case of *Arnold* v. *United States* (C. C. A. 8), 115 F. (2d) 523, the Court construed the following criminal statute:

> "whoever shall knowingly ship or cause to be shipped from one State * * * into any other State * * * any

package of or package containing spirituous * * * liquors * * * unless such package be so labeled on the outside cover as to plainly show the name of the consignee * * * shall be fined, etc. * * *."

The Court held that the statute did not include private carriers, but that it applied solely to common carriers. It is plain that the literal terms of the statute were broad enough to include any person who shipped. But the Court was mindful of the fact that it was considering a highly penal statute, and in construing it kept in mind throughout what it conceived was the true intention of Congress.

Compare: *United States* v. *Jim Fuey Moy*, 241 U. S. 395; *Taylor* v. *United States*, 207 U. S. 120; *United States* v. *Laws*, 163 U. S. 258; *United States* v. *Kirby*, 74 U. S. 482, 486; *Baltzell* v. *Mitchell*, 3 F. (2d) 428, 430; *United States* v. *Ditorio*, 8 F. (2d) 279, 280; *United States* v. *Baltimore Post Co.*, 2 F. (2d) 761, 763; *Gregg* v. *United States*, 116 F. (2d) 609; *Austin* v. *State*, 53 N. E. 481; *United States* v. *Palmer*, 7 Wheat. 610, 631; *United States* v. *Walter*, 263 U. S. 17; *The Abb Dodge*, 233 U. S. 166, 172; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 217; *National Labor Relations Board* v. *Jones and Laughlin*, 301 U. S. 1, 29; *United States* v. *American Trucking Co.*, 310 U. S. 534.

The above decisions clearly show that the meaning of the word "whoever" depends upon a sensible construction of the statute and the legislative intent. The Government, by isolating the word "whoever" from the statute and seeking its meaning, so isolated, merely begs the question to be decided.

The Government in its brief also discusses at length (pp. 16, 29, 30, 31) the Davis-Bacon Act of March 3, 1931 (c. 411, 46 Stat. 1494; 40 U. S. C., Sec. 276a et seq.) and Title II of the National Industrial Recovery Act of June 16, 1933 (c. 92, 48 Stat. 195; 40 U. S. C., par. 401 et seq.).

The Government *assumes* that Congress had these two Acts in mind when it passed the "Kick-Back" Act. Even though this assumption be accepted, we fail to see how it

aids the construction for which the Government contends. On the contrary, an examination of the Davis-Bacon Act and the provisions of the N. I. R. A. referred to shows a careful and studied effort by Congress to control the payment of *wages by contractors and subcontractors*. Almost every section of these statutes is limited to "contractors and subcontractors". Section 204 of Title II, June 16, 1933, c. 90; 48 Stat. 203 (40 U. S. C., Sec. 404 (c)), not referred to in the Government's brief, provides, in part:

> "all contracts involving the expenditure of such grants shall contain provisions establishing minimum rates of wages, to be determined by the State Highway Department, which contractors shall pay to skilled and unskilled labor * * *."

No one can deny that Congress, in lending money for construction projects, may exact certain agreements and apply certain conditions binding upon those to whom Government money is given. This is the *rationale* of the labor and wage provisions above referred to. The conclusion is irresistible that the "Kick-Back" Act intended to punish criminally those contractors and subcontractors who violated the conditions and agreements which were part and parcel of the federal funds given to them. Only contractors and subcontractors are sufficiently privy to the limitations on the use of federal funds to be in a position to defraud or deceive the Treasury of the United States or the agency disbursing such funds.

The Legislative Intent and History

An examination into the history of the statute discloses beyond doubt, that Congress never intended that it should apply to a situation so wholly local in nature, as is presented by this record. The statute resulted from hearings before a sub-committee of the Senate Committee on Con-

merce, pursuant to S. Res. 74 and 196 (73rd Cong.) and it was drafted and recommended by that body.[1]

The Senate Committee on Education and Labor pursuant to S. Res. 228 (73rd Cong. 2nd Sess.) merely held preliminary hearings on May 4 and 7, 1934, to determine whether conditions were such as to warrant an investigation "of the relationship existing between certain contractors and their employees in the United States."[2]

The legislation in question had passed the Senate and was pending in the House at the time the preliminary hearings were held.[3]

At the preliminary hearings, many representatives of organized labor appeared and gave testimony. What they said may be briefly summarized as follows: Dishonest contractors and subcontractors who had been awarded contracts to perform Federal public construction work (in the District of Columbia), were not paying the prevailing rate of wages to their employees, as required by their contracts. Contractors had gone to other parts of the country where the wage scale was lower and had induced cheap labor, both union and non-union, to come to the District. These workmen were offering their services at rates far below the prevailing wage scale in the District. Dishonest contractors were taking unfair advantage of the situation by employing these workmen at low rates and using all sorts of subterfuges to cloak their illegal operations. Those complaining sought a curb of such activities.[4]

After the preliminary hearings were completed, the subcommittee was authorized to proceed and it did not commence to hold its hearings until June 21, 1934, which was after the "kick-back" statute was enacted.[5]

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[1] S. Report No. 1189 (75th Cong. 1st Sess.), pp. 4, 20.

[2] Hearings before sub-committee of the S. Committee on Education and Labor, Part 1, pp. 1, 2.

[3] Id. p. 3.

[4] Id. pp. 2 to 161.

[5] Id. pp. 1, 2.

The record of proceedings before that sub-committee do not express a purpose by Congress to extend the statute in the manner contended for by the Government.

The report of the sub-committee of the Committee on Commerce pursuant to S. Res. No. 74 and 196 (73rd Cong.) discloses that this statute was first discussed on December 21, 1933; after George J. Atwell, president of the George J. Atwell Foundation Corp. had complained to the committee and had appeared and testified before it.[6]

The committee was obviously impressed by his testimony, and the views he expressed and the suggestions which he offered, are reflected in the text of the statute.[7]

It was his view that the "kick-back" was the fault of the contractor who bid so low for Federal work that he could not do it at the price without receiving a "kick-back" from the workmen.[8]

That practice put the honest contractor to a serious disadvantage. It was Mr. Atwell's suggestion that the Government rid itself of such dishonest contractors by compelling them to pay the prevailing rate of wages and stop them from obtaining a "kick-back" from the workmen.[9]

He suggested that every payroll should be certified and sworn to by the contractors.[10]

That suggestion is clearly embodied in the statute.[11]

Most of the testimony before the committee related to incidents basically similar to those charged in the indictment under consideration.[12]

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[6] S. Report No. 1189 (75th Cong., 1st Sess.) p. 4—hearings before sub-committee of the S. Committee on Commerce (73rd Cong., 2nd Sess.) Vol. 1; part 5, p. 789.

[7] S. Report No. 1189 (75th Cong., 1st Sess.) p. 20.

[8] Hearings before sub-committee of the S. Committee on Commerce (73rd Cong., 2nd Sess.) Vol. 1, Part 5, p. 792.

[9] Id., pp. 793, 796.

[10] Id., p. 793.

[11] S. Report No. 1189 (75th Cong., 1st Sess.) pp. 20, 46. See Sec. 2 of the Act, 40 U. S. C. 276C.

[12] Report No. 1189 (75th Cong., 1st Sess.), p. 20 Hearings before sub-committee of the S. Committee on Commerce (73rd Cong., 2nd Sess.), Vol. 1, Part 5, pp. 790-826.

In Respondent's Brief—United States of America v. Frank Laudani—No. 71

Addendum Page 16, Line 7

The report of Mr. Sumners of the Committee on Judiciary in the House contains the following:

"This bill is aimed at the suppression of the so-called 'kick-back racket' by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay, but thereafter forces them to give back to him a part of the wages they have received" (R. 236).

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[13] The Committee reported (p. 20):

"After a thorough study of the testimony given and the complaints made, *the committee concluded that the majority of the cases presented were of a local nature and were not within the jurisdiction of the Federal Government.* But it was decided that the committee could effectuate the purpose of certain Federal statutes concerning rates of wages to be paid on work done under Government contracts. To this end a bill (S. 3041) was introduced during the Seventy-third Congress entitled 'A bill to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.' This bill passed both Houses, and became Public Act No. 324. In accordance with the power conferred by this act, the Secretary of the Treasury and the Secretary of the Interior jointly promulgated a series of regulations, effective January 15, 1935, which were to be incorporated in every Federal Government contract. This regulation required the filing of an affidavit sworn to by the person in charge of the pay rolls, attesting the pay roll and that no rebates or deductions were made, directly or indirectly." (Italics supplied.)

[14] S. Report No. 1189 (75th Cong., 1st Sess.) p. 18.

scionably enrich themselves at the expense of their employees in denial of their contracts of employment" (R. 244).

And in holding:

"But nowhere in the Act, its title, or its legislative history is it suggested that it was intended thereby to reach an extortioner or blackmailer (not privy to the contract of employment) merely because the persons upon whom such an offender preys receive their compensation as employees of a contractor doing public work financed in whole or in part by federal aid" (R. 245).

The Construction Urged by the Government Should Be Rejected Because Its Limitless Application Would Reduce the Statute to An Absurdity; Such a Statute Would Be Unconstitutional and Would Be So Vague and Uncertain As To Be Unenforceable

We believe that the apparent absurdity and inefficacy of a construction of the "Kick-Back" Act as urged by the Government furnishes one of the most cogent and sound arguments for the construction urged by this Respondent. A breakdown of the Government's analysis of the statute shows the following: "whoever" is urged by the Government to mean "any person" without limitation (Government's Brief, pp. 14, 20). The "contract of employment" is held to have no esoteric meaning and is used merely to identify the money (Government's Brief, p. 33). "Give up" does not mean "kick-back" or a return of the money (Government's Brief, p. 26), and the phrase "by force, intimidation, threat or procuring dismissal from such employment or by any other manner whatsoever", is not limited to acts or conduct relating to a "kick-back", but is broad enough to encompass any act or conduct of anyone.

By rewriting and rephrasing the statute in accordance with these analyses and contentions, we have

> "any person, whether connected with the victim's employment or not who shall, by any manner whatsoever, induce a person employed in the construction (of projects wholly or partly financed by Federal funds) to give up any part of the compensation to which he is entitled, shall be fined not more than Five Thousand ($5000) Dollars or imprisoned not more than five years, or both."

We submit that such a statute compels the following criticisms: The statute will be practically without limitation and reduced to an absurdity; the statute would be unconstitutional; and finally it would be so vague and indefinite as to be unenforceable.

Reductio ad Absurdum

The absurdity of the Government's contention is clearly recognized by the majority opinion below (R. 245):

> "But nowhere in the Act, its title, or its legislative history is it suggested that it was intended thereby to reach an extortioner or blackmailer (not privy to the contract of employment) merely because the persons upon whom such an offender preys receive their compensation as employees of a contractor doing public work financed in whole or in part by federal aid. Nor would a court be justified in so extending the statute."

The illustrations could be multiplied indefinitely. Congress never intended that the legislation in question should apply to the bandit who, by force, steals from the workman; the landlord, who coerces to get his rent; or the union official who intimidates a workman in order to collect dues that he may owe to a union. Nor could it apply to a shopkeeper or vendor who fraudulently misrepresents the goods sold to the workman. Such individuals are in a legal sense, strangers to the Government, as well as the workman. They have no contract with the Federal Government and therefore, have not submitted themselves to its control.

They have no contract with the workmen and are, legally, strangers to them. If the phrase "or by any other manner whatsoever", as the Government contends, is not limited to illegal or unlawful means, the applicable illustrations continue ad infinitum invading almost every type of human conduct, legal or illegal. In this fashion the "Kick-Back" Act would apply to all who sell merchandise to a person employed on a Government financed project and agree to accept payment weekly out of the employee's salary, or to a vendor who takes an assignment of wages from such employee, or to a finance company, or to a bill collector or to a collection company. Is this the scope of the "Kick-Back" Act intended by Congress? Is this a construction of the statute reasonably in accord with its manifest purposes? Is this a strict construction in favor of the accused?

Unconstitutionality

Before amplifying this criticism of the Government's construction of the statute, we must call attention to an inconsistency in the Government's Brief. In footnote 33, page 36, it is stated:

> "Since the Government is not here urging the application of the statute to the conduct of one who was 'wholly unconnected with his (victims) employment,' there is not here presented the constitutional problem which the Circuit Court of Appeals felt that such a construction might involve" (R. 246).

We fail to understand how the Government can suddenly inject this statement in its brief, in view of the many pages presented, directly to the contrary. The fact is that the Government contends that the "Kick-Back" Act applies without limitation. This is irrefutably shown by the references to the brief stated above wherein the Government sought to construe "whoever", "contract of employment", "give up", and the phrase relating to "force, intimidation, etc.". Throughout the brief the Government has argued that the statute "does not suggest methods which only an

employer, or one acting on his behalf, would be capable of using" (p. 15). That, "as is evident from its sweeping terminology and avowed purposes, the statute had a broader and not quite so technical an end in view" (p. 15). That the purpose of the Act is that the workman "should have the full enjoyment and benefit of those wages" (p. 16). That the statute is broad with sweeping terminology (p. 29). Repetition of these phrases will be found throughout Government's brief.

The only explanation that we can diagnose for the amazing statement in footnote 33, page 36, is that the Government belatedly realized that its own construction of the "Kick-Back" Act left the door wide open to the finding of unconstitutionality. The Government realized at the outset that a broad construction would have to be adopted to hold the Respondent, and it ingeniously hit upon the broad and limitless evil of "lowering of the living standards of working men" (p. 32); thereafter with blind enthusiasm and for many pages, the Government pursued its course, eliminating practically all limitations to the operation of the statute, and making it applicable to everybody and everyone (contrary, as we shall show later to both the majority and dissenting opinions of the Court below).

The first dampening of the Government's enthusiasm came with the recollection of the "check off" system. The mental process is clear. The Government couldn't admit that a "check off" violated the "Kick-Back" Act and yet a "check off" clearly was contrary to the construction which it urged. The Government had to explain away this anomoly. The purported explanation is found in the Government's brief, footnote 26, pages 33, 34. The weakness of the explanation is apparent on reading this footnote. In the first place, the Government says, "in our opinion" a "check off" would not fall within the "Kick-Back" Act. Certainly it can as plausibly be said or argued that a "check off" is illegal and criminal as violative of this statute (and especially so where a union forces the employee to

agree to the "check off" as a condition to remaining employed). Secondly, the Government states in effect that a "check off" would be an exception to the statute. This bold statement and nothing more is a clear example of sophistic reasoning. The Government reasons that the statute should be construed in a certain manner and then starts recognizing exceptions to its own reasoning. Isn't it more logical to say that Congress must have been aware of its own legislation and policy permitting "check offs", and that the statute should therefore be construed in recognition thereof?

Almost at the time the end of the brief was reached and in footnote 33, page 36, the Government's enthusiasm (for its broad and sweeping construction) had changed completely to fear—fear of the constitutionality of the statute if construed accordingly.

This fear is recognized by the majority opinion below (R. 246):

> "Under the construction of the statute, here involved, which the government necessarily urges in an effort to sustain the indictments, the blackmailer, who, wholly unconnected with his victim's employment, requires and receives a part of the employee's wages each week for withholding knowledge of something which the latter desires to keep secret from his employer lest he lose his job, would be equally indictable. Clearly, the statute was not so intended. Furthermore, any such extension of its scope suggests the possible invasion of the field of private rights and wrongs, unrelated to any federal interest or concern, which Congress is without constitutional warrant to enter upon. 'The regulation of the conduct of its own citizens belongs to the State, not to the United States.' United States v. Constantine, 296 U. S. 287, 296."

This fear of unconstitutionality is likewise justified by the decisions.

> "* * * an act committed within a State, whether for a good or a bad purpose, or whether with an honest

or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate." *United States* v. *Fox*, 95 U. S. 670, 672.

"In this view the statute is a clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution * * *.

* * * The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of State concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives." *United States* v. *Constantine*, 296 U. S. 287, 296.

"There is, of course, no constitutional power in Congress to prohibit or to punish assaults committed in the territorial limits of the state of South Carolina, unless they in some way interfere with the operations of the federal government." *Bray* v. *United States*, 289 Fed. 329, 332.

To the same effect, *United States* v. *Doremus*, 249 U. S. 86, 93, 95; *United States* v. *Butler*, 297 U. S. 1, 68; *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947.

The state, through the exercise of its police power, has the exclusive duty and power to protect its local workmen from the depredations of those who through fraud, oppression, coercion, or other wrongful act seek to take unfair advantage of them. On what constitutional ground can certain workmen be singled out as entitled to federal pro-

tection, simply because their employer is engaged in working on a purely local project which is partly dependent upon federal grant? What constitutional sanction recognizes that threats of extortioners and blackmailers are greater or different with relation to such employees as distinguished from all employees? What reasonable relation is there between this statute and extortion from a workman merely because he exerts his labors on a local project partially financed by federal funds? The majority opinion below states (R. 245):

> "Equally reprehensible though it is for one not the employer to exact tribute from a workman upon threat of disturbing him in his employment, no greater need for federal protection of workers against the threats of extortioners or blackmailers in general is indicated simply because their employer happens to derive all or a part of his income from work dependent upon federal loans or grants. All other workers merit no less consideration. But extortion or blackmail visited upon private persons in respect of their private rights or property are offenses which, under our federal system, have been left to the criminal administration of the states."

Nor can the construction urged by the Government find constitutional sanction in the theory that the project (financed in whole or in part by federal funds) is within the jurisdiction of the United States. Article IV, Section 3, clause 2, of the United States Constitution gives Congress power to make all needful rules and regulations respecting the territory or other property belonging to the United States. The statute (18 U. S. C. Sec. 451) affords federal jurisdiction over crimes committed within or on any lands reserved or acquired for the exclusive use of the United States and under its exclusive jurisdiction or any place purchased or otherwise acquired by the United States by the consent of the legislature of the state for the erection of a fort, magazine, etc.

This statute cannot help the Government in its contention because it is now settled beyond question that the United States must have been given exclusive jurisdiction and possession of the property in question and further that the state legislature must have granted Congress criminal jurisdiction thereof. *Bowen* v. *Johnston*, 306 U. S. 19; *United States* v. *Bevans*, 3 Wheat., 336; *United States* v. *McGowan*, 302 U. S. 535; *United States* v. *Bowman*, 260 U. S. 94.

It must not be overlooked, that the project upon which the workmen were employed was not a federal project, but a purely State project undertaken by a State agency. The workmen were not Government employees or officials. They were the private employees of a private domestic contractor. It is extremely doubtful that any part of the federal grant was actually disbursed to the employees or their employer (R. 53, 54).

In light of the authorities heretofore cited, we believe, that if the construction urged by the Government were adopted, the statute would be unconstitutional. Certainly, the most that can be favorably said, even affording the benefit of every reasonable doubt, is, that there still remains grave doubt on that score.

In *Linder* v. *U. S.*, 268 U. S. 5, this Court states on pages 17, 18:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced. McCulloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605; License Tax Cases, 5 Wall. 462, 18 L. ed. 497; United States v. Dewitt, 9 Wall.

41, 19 L. ed. 593; Keller v. United States, 213 U. S., 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1101, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724; Child Labor Tax Case, 259 U. S. 20, 66 L. ed. 817, 21, A. L. R. 1432, 42 Sup. Ct. Rep. 449. In the light of these principles and not forgetting the familiar rule, that *'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score'*, the provisions of this statute must be interpreted and applied." (Italics ours.)

To the same effect see *Cohens* v. *State of Virginia*, 6 Wheat. 264, in which the Court held that an act of Congress would not be construed so as to imply an intention of interfering with the penal laws of a state unless the provisions of an act are such as to render the construction inevitable.

Vagueness and Uncertainty

The construction urged by the Government would leave the statute so vague and uncertain that it would be ineffectual and unenforceable. The Government has refused to recognize that the doctrine of *ejusdem generis* applies to the expression "or by any other manner whatsoever". We have also demonstrated the Government's construction of the word "whoever", as well as the other language in the statute. In *Connally* v. *General Construction Co.*, 269 U. S. 385, the Court states on page 391:

> "That the terms of a penal statute creating a new offence must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, this Court held on page 453:

> "No one may be required at peril of life, liberty, or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the statute commands or forbids."

To the same effect are, *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242, 243; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 458; *Small Co.* v. *American Sugar Rfg. Co.*, 267 U. S. 233, 239; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *International Harvest Co.* v. *Kentucky*, 234 U. S. 216, 221; *Weeds* v. *United States*, 255 U. S. 109; *Stromberg* v. *California*, 283 U. S. 359, 369; *Smith* v. *Cahoon*, 283 U. S. 553, 564; *Herndon* v. *Lowry*, 301 U. S. 242, 261.

Before leaving the criticism of the construction of the statute urged by the Government, it is noteworthy to point out that the Government does not agree with either the majority or the dissenting opinion below. The dissenting opinion of Judge Biggs makes it clear that he agrees that the statute was not intended to apply to instances of extortion unconnected with the contract of employment (R. 249). His only disagreement with the majority is that the limitation imposed by the majority is too strict and that a foreman is an official of a company close enough to the contract of employment to be within the statute. As stated above, the Government does not agree with either opinion, since the Government's construction of the statute depends clearly and unequivocably upon a determination that the statute is intended to apply to conduct unconnected with the contract of employment, and to anyone without limitation.

CONCLUSION

The construction of the statute adopted by the Court below is in clear accord with the obvious intent of the Congress and is consonant with reason and the limitations on the federal jurisdiction. It leaves the statute sufficient and efficient for the purposes it was intended to serve.

The construction urged by the Government requires a venture into the realm of the imagination in order to torture the plain meaning into absurdity, and to reach a result wholly foreign to the legislative intent.

Respectfully submitted,

HAROLD SIMANDL,
Attorney for Frank Laudani, Respondent.

December 11, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 71.—October Term, 1943.

The United States of America, Petitioner, *vs.* Frank Laudani.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 3, 1944.]

Mr. Justice Black delivered the opinion of the Court.

Indictments returned in a United States District Court in New Jersey charged that the respondent Laudani, while acting as a company foreman with authority to employ and discharge workers on a public works project financed in part by the United States, had contrary to Section 1 of an Act of June 13, 1934,[1] forced certain of his subordinates to give him part of their wages in order to keep their jobs. Laudani moved to quash assigning as one ground that the indictments failed to charge conduct prohibited by this Act since they did not contain allegations that he was the employer of the coerced men or that he had acted as agent of the employer in forcing the payments. The gist of his contention was that the prohibition of the Act extends only to employers and persons who act in concert with them. The District Court concluded that the Act applied to a foreman such as Laudani, overruled his motion, and a jury convicted him. The Circuit Court of Appeals accepted Laudani's contention, reversed the judgment, and directed that the indictments be quashed. 134 F. 2d 847. The public importance of the question presented prompted us to grant certiorari.

Both the language and history of the Kickback Act argue against the conclusion that Congress intended its prohibition to

[1] This Act is commonly known as the "Kickback" Act. Section 1 provides that, "Whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both." 48 Stat. 948; U. S. C. Title 40, § 276b.

apply only to employers and not to foremen who exercise many of the powers of employers. The Act punishes "whoever" shall induce any person employed on a federally financed work "to give up any part of the compensation to which he is entitled under his contract of employment" by "force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever."[2] The sweep of the word "whoever", if that word stood alone, would be wide enough to include not only an employer but any other person. And the coercive methods of inducement expressly prohibited by the Act are methods in which at least some persons other than employers could engage without legal cause or excuse.

The Circuit Court of Appeals pointed out, however, that if the word "whoever" be given its broadest scope the Act might include common blackmailers who have no relationship to their victims' employment. In an effort to avoid what it considered to be such an extreme application of the Act, the Court focused attention on the clause "to give up any part of the compensation to which he is entitled under his contract of employment." Viewing this clause as proof that the purpose of Congress was to protect the employees' contractual rights to receive wages from their employer, the Court reasoned that no one but the employer or one acting on his behalf possessed "the requisite privity of contract" with the employees to be capable of impairing these rights. Having thus emphasized the Congressional reference to a "contract of employment", the Court stated broadly that, "What happens to the compensation after the employee has received it in full, and wholly without relation to or effect upon his contract of employment, is a matter with which this statute does not purport to deal."

The Court's statement might have been pertinent had the indictments here been against a common blackmailer, extortioner, or some other person not alleged to have been vested by the employer with power to fix and terminate the employer-employee status. But we think that the coerced surrender of wages by employees at the instance of a company foreman given authority by his employer to hire and discharge them cannot properly be said to bear no relation to or have no effect upon their contracts of employment, especially where, as here alleged, the surrender

[2] *Ibid.*

of wages was induced by the foreman's express threat to dismiss all employees who did not comply with his demand. Execution of such a threat against employees unwilling to pay would immediately and completely have terminated their employment contracts. We find nothing in the Act which suggests that, under these circumstances, a foreman must be deemed incapable of violating its provisions merely because he may not stand in that relationship to employees which the Circuit Court characterized as "privity of contract."

The purpose of the Act under consideration is to extend protection not merely to the legal form of employment contracts but to the substantive rights of workers actually to receive the benefit of the wage schedules which Congress has provided for them. The evil aimed at was the wrongful deprivation of full work payments. The Act was adopted near the bottom of a great business depression as one part of a broad Congressional program the goal of which was to strengthen the domestic economy by increasing the purchasing power of the nation's consumers. To this end, Congress enacted legislation designed to relieve widespread unemployment and enable working people to earn just and reasonable wages. A large program for federal financing of public works was established,[3] and legislation was passed requiring government contractors to pay certain minimum wage rates.[4] It was the purpose of the Kickback Act to assure that the federal funds thus provided for workers should actually be received by them for their own use except where diverted under authority of law or a worker's voluntary agreement.[5]

[3] The grant of money for the work on which Laudani was employed was authorized by Title II of the National Industrial Recovery Act enacted June 16, 1933, near the bottom of the depression. Section 1 of this Act declared that the policy of Congress was "... to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." 48 Stat. 195.

[4] Title II, Section 206, of the National Industrial Recovery Act of June 16, 1933, provides in part that, "All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure ... that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort ..." 48 Stat. 204-205; U. S. C. Title 40, § 406. See also an Act of March 3, 1931, as amended, commonly known as the Davis-Bacon Act, 46 Stat. 1494; 49 Stat. 1011; 54 Stat. 399; U. S. C. Title 40, §§ 276a-276a-5; Perkins *v.* Lukens Steel Co., 310 U. S. 113, 128.

[5] See Report of the House Committee on the Judiciary on Bill S. 3041, H. Rep. No. 1750, 73d Cong., 2d Sess. The report printed a letter from the

In view of this background, we cannot hold that Congress intended to exclude from the Act's proscription a foreman with the authority Laudani is alleged to have possessed. Foremen vested with full power to employ and discharge subordinates could frustrate the objective of the Act just as effectively as could their employers, and foremen not given such broad powers might nevertheless be able to use their authority to accomplish the same result. That foremen not only could but might do this very thing was testified at Senate hearings when the problem of "kickbacks" was under study.[6] And the members of the Senate Committee on the Judiciary reporting the bill used language broad enough to include foremen among others when they said that hearings had revealed, "that large sums of money have been extracted from the pockets of American labor, to enrich contractors, subcontractors, and their officials."[7]

To hold that a company foreman vested with sufficient power substantially to affect his subordinates' contracts of employment is within the Act's proscription is not to hold that the Act applies to every extortioner, blackmailer, or other person who extracts money from one who has previously received it for labor on a federally financed project. We need not, at this time, attempt to delineate the outside scope of the Act's application. But the purpose of the legislation, no less than its language, shows that the power to employ and discharge brings an employing company's foreman within its prohibition.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to that court for consideration and disposition of other questions not here involved.

Reversed and remanded.

Federal Emergency Administrator of Public Works, Harold L. Ickes, which urged immediate passage of the bill "to prevent a very prevalent evil in the construction industry which, to the extent that it exists on Public Works projects, defeats the purpose of Title II of the National Industrial Recovery Act and the success of our Public Works program."

[6] See, for example, Hearings, Subcommittee of Senate Committee on Commerce, S. Res. 74, 73d Cong., 2d Sess., Vol. I, pp. 790-792, 801, 826.

[7] S. Rep. No. 803, 73d Cong., 2d Sess.